Filed 3/30/05 In re Z.K. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re Z.K., a Person Coming Under the Juvenile Court Law.	B176000 (Los Angeles County Super. Ct. No. J956599)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. KIM W., et al. Defendants and Appellants.	

APPEAL from orders of the Superior Court of Los Angeles County. Margaret S. Henry, Judge. Affirmed in part; reversed in part with directions.

Lori A. Fields, under appointment by the Court of Appeal, for Appellant Kim W.

Jesse F. Rodriguez, under appointment by the Court of Appeal, for Appellant Frank A.

Ray G. Fortner, Jr., County Counsel, Larry Cory, Assistant County Counsel, and Kim Nemoy, Deputy County Counsel, for Respondent.

Kim W. and Frank A. appeal from an order of the juvenile court terminating their parental rights with respect to their son, Z.K. Kim W. also appeals from the court's order denying her petition under Welfare and Institutions Code section 388, subdivision (a)[1] to set aside its previous order denying family reunification services to her and Z.K.

Kim does not quarrel with the original order denying reunification services but contends the court abused its discretion in continuing to deny reunification services to her and Z.K. because she demonstrated a significant change of circumstances and the court applied inappropriate standards in determining family reunification would not be in Z.K.'s best interests. She further contends the court's order terminating her parental rights is not supported by substantial evidence or would not have been if the court had allowed Z.K. to testify.

Frank maintains he did not knowingly waive his appearance at the hearing terminating his parental rights and he was not adequately represented by his appointed counsel who should have appeared and produced evidence and argument Z.K. was not likely to be adopted.

We find the juvenile court abused its discretion in denying Kim's section 388 petition on the ground reunification services would not be in Z.K.'s best interests. Accordingly we reverse that order and the order terminating Kim's parental rights and remand the cause for further proceedings with respect to Kim as detailed below. We affirm the order terminating Frank's parental rights because even if Frank did not receive competent representation by counsel at the termination hearing the overwhelming evidence shows Z.K. was adoptable. Frank is not entitled to reversal as the result of our reversal as to Kim.

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[1] All future references are to the Welfare and Institutions Code.

FACTS AND PROCEEDINGS BELOW

Kim W. was 36 years old at the time of these proceedings. She had been a dependent child herself, living in various foster homes until she was eight. She then lived with her father for seven years. Her first arrest occurred when she was 11. She turned her first "trick" at the age of 12. At the age of 15 she ran away from home and moved in with a man who fathered her first child, James. A year later she gave birth to Fabian. The following year Kim was committed to the California Youth Authority for stealing a van. She left James and Fabian in the care of her 16 year old brother and his foster mother. The brother's abuse of James led to both children being declared dependents of the court and placed in foster care.

Soon after Kim's release from CYA she gave birth to Gregory who was born with cocaine in his system. Gregory was placed in foster care.

After several more incarcerations Kim became a mother for the fourth time. Her son Rickey was declared a dependent child of the court after he too tested positive for cocaine.

Z.K., the subject of the present case, was born in September 1998. At the time Kim was married to Igor K. but Frank is Z.K.'s biological father. Z.K. lived with Kim for the first three years of his life. Kim voluntarily placed Z.K. in the care and custody of Tina A., Frank's sister, because she recognized her drug addiction prevented her from giving him the kind of home environment he needed.

Z.K. came to the attention of the Department of Children and Family Services in September 2002 following Kim's most recent incarceration. It appears that after Kim left Z.K. in the custody of his paternal aunt, Tina A., Z.K. lived with Frank and Tina for approximately 10 months. Frank testified this arrangement came to an end when he started receiving letters from Kim stating he was not Z.K.'s father and threatening to have him arrested for kidnapping. Fearing Kim would follow through on this threat Frank took Z.K. to Kim's mother's house and left him there. Kim's mother called DCFS and

reported Frank had abandoned Z.K. at her home. DCFS took Z.K. into custody and filed a petition to have him declared a dependent of the court.

By the time of the detention hearing both Frank and Kim were incarcerated. Neither appeared at the hearing. The court appointed attorneys to represent them.

The court tried the issues of paternity and dependency at a contested adjudication hearing in April 2003. At the conclusion of the trial the court sustained the petition, declared Z.K. a dependent of the court and denied family reunification services to Kim and Frank. The court found Frank to be Z.K.'s biological father and Igor to be his presumed father.[2]

In June 2004 the court held a contested hearing on a permanent plan for Z.K. and on Kim's section 388 petition for custody of her son or reunification services based on a change in her circumstances. It was agreed the evidence taken at the hearing would be cross-admissible on both issues. We briefly summarize the evidence here and discuss it in more detail below.

The undisputed evidence showed Z.K., who was now age six, resided with Kim the first three years of his life. She voluntarily placed him with Frank's sister in 2002 because she did not believe she could properly care for him due to her drug addiction. Shortly after this Kim was arrested. She was in jail when the dependency petition was filed in September 2002. Kim failed to contact or visit Z.K. until December 2003. Nor did she contact foster parents or social workers to inquire about Z.K.'s well-being, his health, schooling and daily activities.

Kim testified without contradiction she had successfully completed a drug rehabilitation program and had been sober since October 2003. She told the court she had completely turned her life around and gave examples of how she had changed. She also submitted documentary evidence supporting her rehabilitation. Kim testified she was committed to a drug-free life style and to regaining custody of Z.K. who had lived and bonded with her for the first three years of his life.

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[2] Igor is not a party to this appeal.

The court also heard testimony from Rhonda J., Z.K.'s prospective adoptive parent with whom Z.K. was now living. Rhonda stated she was committed to adopting Z.K.. She had observed contacts between Z.K. before and after the hearing sessions. Z.K. did not appear particularly interested in Kim. When he saw her he did not run up to her or hug her. He referred to his mother as Kim, not as mama or mother.

Kim's sister Tracy testified Z.K. was very affectionate toward Kim. He wanted to talk to Kim on the telephone and went with Tracy to buy his mother a greeting card.

A psychological report on Z.K. stated he expressed the wish to reunite with his biological mother and was excited about his visits with her. The report cautioned, however, most foster children wish for reunification with their natural family and some of Z.K.'s enthusiasm over his visits with his mother could be attributed to the fact his mother brought him toys.

The court denied Kim's request to call Z.K. as a witness.

Neither Frank nor his appointed counsel was present at any time during the four-day contested hearing on a permanent plan for Z.K.. Each day of the hearing the lawyer for Kim announced she was "standing in" for Frank's lawyer. Kim's lawyer offered no evidence or argument on Frank's behalf with respect to the likelihood of Z.K.'s adoption.

After hearing the evidence and argument of counsel the court denied Kim's section 388 petition, terminated the parental rights of Kim and Frank and ordered adoptive planning and placement for Z.K..

Kim and Frank filed timely appeals.

DISCUSSION

I. THE JUVENILE COURT ABUSED ITS DISCRETION IN RULING REUNIFICATION SERVICES WERE NOT IN Z.K.'S BEST INTERESTS.

In April 2003 the court denied reunification services to Kim and Z.K. finding Kim had failed in the past to reunify with Z.K.'s brothers, her parental rights as to those children had been permanently severed and Kim "has not subsequently made reasonable efforts to treat the problems which led to their removal[.]"[3]

In June 2004 Kim petitioned the court to reconsider this order under section 388, subdivision (a)[4] based on her change of circumstances and to either place Z.K. in her custody or provide Z.K. and her family reunification services. Kim's petition alleged that since the court's order denying reunification services she had completed a six month in-patient drug program, she continues to actively participate and volunteer in the substance abuse program, she has maintained her sobriety and is committed to a drug-free life. She also alleged she and Z.K. resided together for the first three years of his life, she can provide him with a drug-free home environment and she desires reunification with her son.

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[3] Section 361.5, subdivision (b) states: "Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, any of the following: . . . (10) That the court ordered termination of reunification services for any siblings of the child because the parent or guardian failed to unify with the sibling after the sibling had been removed from that parent or guardian . . . and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling of that child from the parent. . . . (11) That the parental rights of a parent over any sibling of the child had been permanently severed . . . and that, according to the findings of the court, this parent has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling of that child from the parent."

[4] Section 388, subdivision (a) states in relevant part: "Any parent . . . may, upon grounds of change of circumstances or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made . . . ."

The juvenile court granted Kim a hearing on her petition and combined this hearing with a hearing on selection and implementation of a permanent plan for Z.K..

Kim testified she had successfully completed a substance abuse program in April 2004 along with programs in relapse prevention, parenting and anger management. She continued to participate in weekly relapse prevention meetings and was a mentor to other women going through the program. She had maintained her sobriety since October 2003. In addition, she now had her own residence outside the recovery program. She had been admitted to U.C. Berkeley for the Fall 2004 semester and had received financial aid to allow her to attend. Kim testified she was committed to living drug-free and to regaining custody of Z.K..

In support of the petition Kim introduced into evidence documents from the Magnolia Women's Recovery Program confirming her completion of the substance abuse, relapse prevention, parenting and anger management programs. She also introduced a letter from the executive director of the program stating Kim had set a "standard for her peers" in exemplifying "empathy, dignity, pride, integrity, trustworthiness and responsibility as a woman, mother and alumni."

The principal contested issue at the section 388 hearing was the extent of the bond between Kim and Z.K..

On this issue Kim stated Z.K. had lived with her for the first three years of his life (over half his lifetime at the time of the hearing). She taught him to walk and to say please and thank you when he began to talk. She took him to the doctor for his shots and comforted him afterward.[5] Z.K. called her "Mommy" and would beg to let him sleep with her at night.

Kim testified once she completed the "black-out" period at her drug rehabilitation program and learned about the dependency proceedings involving Z.K. she began making efforts to regain his custody. She testified she made 11 telephone calls to the social

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[5] This contradicts the social worker's hearsay testimony Kim never provided Z.K. with medical attention when they lived together.

worker, only one of which was returned. Once she established contact with the social worker she attempted to arrange visits with Z.K.. The worker made various excuses why this could not be done such as she was moving her office and she had to attend a wedding. Eventually Kim was able to begin monitored visits with her son. She visited Z.K. every month beginning in February 2004 and sent him a card every week. In between visits she telephoned Z.K.'s social worker to find out how he was getting along.

Kim described her first visit with Z.K. The visit took place at a Burger King and lasted approximately two hours. They had cheeseburgers, fries and sodas. Kim took pictures and read to Z.K. "'Do you know who I am,'" Kim asked her son. "'Yeah,'" he replied, "'Kim.'" "'Who is Kim?'" she asked. "'My mama,'" he replied.[6] Kim testified the visit ended "with me crying and him crying."

The next visit was also at a restaurant and again lasted two hours. Kim's sister Tracy and a close family friend who knew Z.K. were also there. Kim and Z.K. ate cheeseburgers and sundaes and played with racing cars. She brought family pictures. Z.K. recognized his brothers and knew who they were. He also recognized his grandparents. Kim brought Z.K. an Easter basket and a book. He called her Kim and Mama.

The third visit took place at the courthouse. Z.K.'s aunt Tracy and his grandmother were also present. Kim testified Z.K. was "hugging my neck real tight." He didn't want to leave her but "just sat there on my lap with his arms around my neck." They talked for approximately an hour.

Kim's sister Tracy testified in support of Kim's petition. Tracy told the court Z.K. was very affectionate toward Kim. She had seen the two of them together for 20 minutes in the parking lot after one of the court sessions. Kim asked Z.K. what he would like her to bring him the next day. Z.K. said he wanted trucks. Kim then asked the prospective adoptive mother what he needed. She told Kim he needed boxer shorts and tee shirts.

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[6] Kim testified Z.K. told her it was the social worker who told him his mother's name was Kim.

When it was time to go Kim, Tracy and Z.K. had a group hug and prayer. Z.K. referred to Kim as Mama. Tracy did not hear him call her Kim during this visit. Later the same day Z.K. asked Tracy if he could call his mother on the telephone. Tracy explained his mother had already taken the bus back to her home in Northern California. On Z.K.'s initiative they went to a store to buy his mother a greeting card.

The court also received a report from Dr. Collins-Faulkner, a clinical child psychologist. She interviewed Z.K. when he was age 5 years six months. Dr. Collins-Faulkner found Z.K. "serious" but "quite talkative." She reported Z.K. "immediately mentioned without prompting that he had seen his mother and wanted to tell the examiner all the things that she had brought him." She went on to state she "was careful to ascertain whether he was talking about his real mom or his foster mom and he was able to delineate between the two." Z.K. told the psychologist he wanted to see his "real mom" again and that "he loves that mom better than the current mom." Throughout the interview Z.K. "was focused on wanting to discuss his real mother." Asked what he would wish for, Z.K. replied he would wish to live in his own house with "my mom and dad, my real mom and dad." The psychologist noted the kind of wish expressed by Z.K. "is a common wish with most children in the foster system." She also cautioned Z.K. "may be somewhat over idealizing his [biological] mother, since she did provide him with a lot of toys."

In conclusion, the psychologist stated: "If [the mother] is able to be stable and secure, has gained employment, is able to care for her son, understand his needs for special education, help in continuing to secure help for his speech impediment, help with his delays in skill areas, and if she has the stability and ability to do this and is willing to make that investment, then Z.K. might benefit from the connection with his mother."

The court denied Kim's request to have Z.K. testify regarding the bond between them.[7]

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[7] Kim maintains denying her the opportunity to question Z.K. about his bonds to her and his prospective adoptive mother denied her due process and constituted an abuse of

The prospective adoptive parent, Rhonda J., testified she had never observed any interaction between Z.K. and Kim. She later admitted she had seen them hug and kiss the previous day. She also testified she heard Kim ask Z.K. what he wanted her to bring him. Z.K. responded he wanted trucks. Kim brought the trucks the next day. Later Rhonda testified Z.K. asked for a Cat In The Hat backpack, trucks, boxer shorts and tee shirts all of which Kim brought the next day. Rhonda told the court she had never heard Z.K. call Kim mother or Kim. In the three months Z.K. had lived with her he had never asked about his "real" mother or made any reference to her. On further questioning, however, Rhonda stated he refers to his mother as Kim and never as Mother or Mama. Asked about her other observations, Rhonda testified she sat with Kim, Z.K. and Z.K.'s brother Fabian in the waiting area one day. Z.K. was talking to Kim and Fabian. He did not appear distressed. When he first saw his mother he did not run up and hug her. Kim and Z.K. sat on a bench and played with the trucks she had brought him. Kim would ask Z.K. what color the trucks were and she would give him the truck of the color he named.

DCFS introduced several reports into evidence. The social worker who monitored Kim's visits with Z.K. stated Z.K. did not recognize or remember his mother at their first meeting. As the visit progressed he warmed up to her and opened the presents Kim brought him. In the worker's opinion the affection Z.K. showed toward his mother did not indicate memories or feelings of attachment to her. He was friendly with everyone, she stated; even perfect strangers. The worker acknowledged Kim had mailed Christmas gifts to Z.K. and sent him cards weekly.

For the record the court noted when the boy came to the courtroom on the first day of the hearing "Z.K. did not acknowledge his mother at all." Kim testified this was not normal; "he never acts like that" in their visits.

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discretion. Because we reverse the order denying the section 388 petition on other grounds we do not reach this issue. If the issue arises again at a subsequent hearing in this matter the court should reevaluate its previous ruling based on the current facts and circumstances.

The court resolved the conflicts in the evidence regarding Z.K.'s conduct with Kim in Kim's favor. "I believe every word mother said about how he behaved," the court stated. The court also found Kim had demonstrated a change in circumstances with respect to her drug use.

Nevertheless the court denied the section 388 petition finding it would not be in Z.K.'s best interests to delay a permanent plan for him while he and Kim received family reunification services. The court expressed two reasons for its decision. Kim had been drug free for only a short time and there was insufficient evidence of a bond between mother and son.

While acknowledging Kim had over eight months of sobriety the court noted Kim had tried and failed before to stay free of drugs and it was too soon to tell whether her new drug-free life style would be permanent. In the meantime, the court observed, Z.K. was growing up fast and needed a stable, secure home environment. "He's five already," the court noted, "and he hasn't had a permanent home. And now he's really got the chance for one [with the prospective adoptive parent], and it appears to be a really suitable one."

The court also found Kim failed to establish such a strong bond between her and Z.K. that delaying the permanent placement plan would be in his best interests.

We review the denial of a section 388 petition for abuse of discretion.[8] In doing so we do not substitute our own judgment for the judgment of the juvenile court but determine only whether the juvenile court's exercise of discretion was consistent with the language and purpose of the statute given the facts and circumstances of the case.[9] The burden is on the petitioner to show by a preponderance of the evidence the child's welfare requires the modification.[10]

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[8] *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.

[9] *In re Stephanie M.* (1994) 7 Cal.4th 295, 318; see *In re Marilyn H.* (1993) 5 Cal.4th 295, 307.

[10] California Rules of Court, rule 1432, subdivision (f).

Under section 388, subdivision (a) the parent must present evidence of a "change of circumstance or new evidence" arising after the order the parent seeks to change, modify or set aside. Kim's successful completion of a drug rehabilitation program and her continuing sobriety clearly constituted a change of circumstance arising since the denial of reunification services, and the trial court so found.[11] Although the statutory language does not impose a "best interests" test for granting a modification of a prior order such a requirement has been read into the statute by a long line of cases.[12] Hence "[i]t is not enough for a parent to show *just* a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child."[13] Whether family reunification services would have been in Z.K.'s best interests 21 months after he was taken into DCFS custody was the determinative issue before the court in considering Kim's petition.

In *Marilyn H.* our Supreme Court held a parent's constitutional right to due process required an "'escape mechanism'" be built into the dependency proceeding "to allow the court to consider new information.[14] The court explained: "Sections 366.26 and 388 when construed together and with the legislative scheme as a whole, are reasonable and bear a substantial relation to the objective sought to be attained. The parent's interest in having an opportunity to reunify with the child is balanced against the child's need for a stable, permanent home. The parent is given a reasonable period of time to reunify and, if unsuccessful, the child's interest in permanency and stability takes priority."[15] The court went on to state, however, "*Even after the focus has shifted from*

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[11] Respondent argues Kim merely presented evidence of "changing" circumstances, not "changed" circumstances. (See *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) The trial court, however, treated the extent of Kim's rehabilitation as relevant to the determination whether family reunification services would be in Z.K.'s best interests. We will follow this same pattern of analysis.

[12] See *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526, footnote 5.

[13] *In re Kimberly F.*, *supra*, 56 Cal.App.4th at page 529, italics in original.

[14] *In re Marilyn H.*, *supra*, 5 Cal.4th at page 309.

[15] *In re Marilyn H.*, *supra*, 5 Cal.4th at page 309.

reunification, the scheme provides a means for the court to address a legitimate change of circumstances while protecting the child's need for prompt resolution of his custody status. Thus, both substantive and procedural due process are satisfied."[16] *Marilyn H.* clearly teaches an important lesson: even if the child has been in the dependency system for a year and a half or more prior to the permanent placement hearing it is still not too late to roll back the proceedings to address "a legitimate change of circumstances."

We recognize there are appellate decisions holding the juvenile court did not abuse its discretion in denying a section 388 petition filed on the eve of a permanency hearing and seeking reunification services based on drug rehabilitation. In *In re Amber M.* the petition was denied even though the mother had been clean for over a year at the time of the section 388 hearing.[17] In *In re Clifton B.* the father had 200 days of sobriety since his most recent relapse.[18] And in *Casey D*. the court held five months without drug use was not sufficient to require an order for reunification services.[19]

Kim's case is distinguishable from these cases in several respects. In *Amber M.* the dependency petition was based on the mother's parental neglect in leaving her seven month old child alone in a bathtub where she nearly drowned, and the mother had already had more than 18 months of reunification services.[20] Similarly, in *Clifton B.* the 20 month old child was found wandering in the middle of a busy intersection while the father slept. The father had been afforded 12 months of reunification services.[21] In *Casey D.* the child was born with heroin in his system, the parents had not complied with their reunification plan, the mother only engaged in drug treatment programs when required to do so by outside agencies and then relapsed once the requirement was lifted and at the time of the

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[16] *In re Marilyn H.*, *supra*, 5 Cal.4th at page 309, italics added.

[17] *In re Amber M.* (2002) 103 Cal.App.4th 681, 686-687.

[18] *In re Clifton B.* (2000) 81 Cal.App.4th 415, 423-424.

[19] *In re Casey D.*, *supra*, 70 Cal.App.4th at page 48.

[20] *In re Amber M.*, *supra*, 103 Cal.App.4th at pages 684, 686.

[21] *In re Clifton B.*, *supra*, 81 Cal.App.4th at pages 419-420.

section 388 petition the mother had failed to enter a 12-step program for her drug addiction.

In contrast, there was no evidence Z.K. was born with drugs in his system. Nor was there any evidence Kim abused or neglected him during the three years he was in her custody and control. Although Kim had engaged in other drug rehabilitation programs before entering Magnolia she never took those other programs seriously or had any intention of getting off drugs. As she explained to the court the previous programs were prison programs she entered simply as a way of getting out of her cell for a while.

It is also significant that unlike the petitioners in the cases discussed above, Kim has never been afforded family reunification services with Z.K.. This is not the case of a parent who was provided reunification services, failed to take advantage of them, and now wants a second chance. It is the case of a parent who never had a first chance. Moreover, this is not a case of a parent's "foxhole conversion" to sobriety on the brink of forever losing her child. Kim had been drug free for eight months prior to the section 388 hearing.

Kim was denied reunification services with Z.K. for reasons which had nothing to do with her parenting of Z.K. but because in the past, when she was an active addict, her four older children had been declared dependents of the court, reunification services with them had been terminated, her parental rights severed and because the court found by clear and convincing evidence she had not subsequently made a reasonable effort to treat the problems which had led to the removal of those children.[22]

If, however, the facts with respect to Kim's drug rehabilitation[23] had existed in April 2003 when the juvenile court initially made its determination whether to afford family reunification services to Kim and Z.K. it seems certain the court would have ordered services be provided. Given the facts regarding her rehabilitation the court could not have rationally found by clear and convincing evidence Kim had failed to make a

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[22] Section 361.5, subdivision (b)(10), (11).

[23] See pages 6-7 *ante*.

"reasonable effort" to treat the drug addiction which led to the removal of her older children. The question now is whether it would have been in Z.K.'s best interests in June 2004 to order family reunification services.

As previously noted the court found it would not be in Z.K.'s best interests to order family reunification services because the court could not be sure Kim would remain drug free and there was insufficient evidence of a bond between mother and son. For the reasons explained below we conclude the court's reasons were inappropriate under the circumstances and the error was prejudicial.

Kim's drug rehabilitation efforts were certainly a proper factor for the court to consider.[24] And the court was correct of course in observing there was no guarantee Kim would not relapse into drug use. But on the other hand the court could not be certain she would relapse. For all the court knew eight months may have been close to the end of her sobriety or only the beginning. This is why the court erred in attempting to gauge Z.K.'s best interests by the indeterminable measure of Kim's continued sobriety. What the court should have done was look at the facts and circumstances of Kim's rehabilitation as an indication of her probable success. Viewed in this manner the evidence favored Kim's continued sobriety.

Kim voluntarily entered the Magnolia recovery program. She called her parole officer and told her "I need help. I am tore up. I'm going to die a drug addict, I need help." She successfully completed the program and moved on to a 12-step program she had been attending weekly. She also mentored other women seeking to follow the same path. She had eight months of sobriety at the time of the section 388 hearing. The most significant aspect of Kim's rehabilitation, however, was her mature understanding of her addiction. When asked on cross-examination if she was concerned about relapsing Kim replied: "The honest answer to that question is I can't live my life in fear of relapse. I have to live my life for today. I'm sober today and today I'm doing things to secure that I'll be sober tomorrow. That is all I can do. . . . I'll forever be an addict. I'll never be

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[24] See *In re Kimberly F.*, *supra*, 56 Cal.App.4th at pages 530-531.

cured. There's no miracle pill or program or circumstances that cures an addict. It's an affliction I'll live with and I'll die with. It's what I choose to do with my addiction and today I do have a choice."

The bond between Kim and Z.K. was also a proper factor for the court to consider along with the bond between Z.K. and his prospective adoptive mother, Rhonda J. But once more the court approached the issue from the wrong perspective.

In most cases when a parent who has not been afforded reunification services seeks to obtain those services based on a legitimate change in circumstances the depth of the bond between the parent and child is not an appropriate measurement to determine the best interests of the child, especially when the parent has not had the opportunity to care for the child on a day-to-day basis for over two years. The existence or nonexistence of a parental bond becomes significant only *after* reunification services have been tried and failed.[25] Up until then "the parent's interest in reunification is given precedence over the child's need for stability and permanency."[26] Furthermore, one of the purposes of reunification services is to assist the parent in establishing a bond with her child.[27] To deny a petition seeking to obtain reunification services on the ground there is an insufficient bond between the parent and child turns section 388 on its head.[28]

We acknowledge cases may arise in which the absence of a bond between parent and child justifies a decision that initiating reunification services would not be in the child's best interests. For example, a case might occur in which the child has spent a substantial period of time in one foster home and there is evidence severing the bond with the foster parents will cause long-term, serious emotional damage to the child.[29]

This is not such a case. Kim cared for Z.K. for the first three years of his life. He recognizes and remembers her, his older brothers, even his dog. Once Kim had her

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[25] *David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 788.

[26] *In re Marilyn H.*, *supra*, 5 Cal.4th at page 310.

[27] See *In re Kimberly F.*, *supra*, 56 Cal.App.4th at pages 529-530.

[28] *In re Kimberly F.*, *supra*, 56 Cal.App.4th at page 530.

[29] See *In re Jasmon O.* (1994) 8 Cal.4th 398, 419.

rehabilitation on track she engaged in regular visits with Z.K. and wrote to him between visits. Although Z.K. had been in foster care for 21 months at the time of the section 388 hearing he had been in Rhonda J.'s care for less than three months. There was no evidence severing his bond with Rhonda would cause him long-term, serious emotional damage. On the contrary, the psychologist's report suggested Z.K. would not be emotionally affected if he left Rhonda's home to reunite with his mother.

Finally, the juvenile court failed to give any consideration to another important "best interests" factor in this case: if reunification services were provided to Kim and Z.K. but proved unsuccessful Z.K. would not lose his adoptive placement with Rhonda. Rhonda testified she was "in it for the duration" and would still want to adopt Z.K. regardless of whether the court ordered family reunification services.

In summary, the juvenile court abused its discretion in denying the section 388 petition seeking family reunification services on the ground providing such services would not be in the child's best interests. Our Supreme Court has made clear any previous order of the court can be changed, modified or set aside right up to the time a permanent plan decision is made if the parent shows a legitimate change of circumstances. The court agreed Kim showed a change of circumstances. Uncertainty over how long a recovering addict will stay clean is not a justification for denying the petition. Rather the court should consider the facts and circumstances of the rehabilitation including whether the parent was forced into the program or entered voluntarily, whether the parent has relapsed since leaving the program, whether the parent is actively participating in a 12-step program and how well the parent understands the nature of her addiction and how to deal with it. Except in unusual cases, the depth of the bond between a parent and child who have never been afforded reunification services is not a significant factor in determining whether reunification services would be in the child's best interests. Finally, when the child is in a no-lose situation where reunification services, even if they fail, will not adversely affect the child's opportunity for adoption the court should afford the parent and child an opportunity to reunite as a family unless

there is a clear showing to do so somehow would result in serious emotional harm to the child.

Our reversal of the order denying Kim's section 388 petition necessarily requires reversal of the order terminating Kim's parental rights under section 366.26.[30]

II. FRANK A.'S APPEAL FAILS BECAUSE OF THE OVERWHELMING EVIDENCE OF Z.K.'S ADOPTABILITY.

Frank A., the biological father, appeals from the order terminating his parental rights. He contends he was denied competent assistance of counsel at the section 366.26 hearing because (1) his appointed counsel did not appear at the hearing but instead arranged to have Kim's counsel "stand-in" for her without Frank's knowledge or consent; and (2) the stand-in counsel failed to present any evidence or argument challenging Z.K.'s adoptability. He further contends he did not knowingly waive his right to attend the 366.26 hearing. Respondent argues men such as Frank who are "mere" biological or genetic fathers are not entitled to appointed counsel under section 317[31] therefore Frank has no ground for complaining about the adequacy of his representation.[32] Furthermore, counsel's failure to present evidence or argument on the issue of Z.K.'s adoptability was not prejudicial because of the overwhelming evidence of the likelihood of Z.K.'s adoption.[33]

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[30] *In re Clifton V.* (2001) 93 Cal.App.4th 1400, 1406; *In re Kimberly F.*, *supra*, 56 Cal.App.4th at pages 535-536.

[31] Section 317, subdivision (a) states: "When it appears to the court that a parent or guardian of the minor desires counsel but is presently financially unable to afford and cannot for that reason employ counsel, the court may appoint counsel as provided in this section."

[32] Section 317.5, subdivision (a) states: "All parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel."

[33] See section 366.26, subdivision (c)(1).

Whether Frank waived his right to be present at the 366.26 hearing is a question of fact. The juvenile court found Frank received notice of the hearing and waived his right to be present. Substantial evidence supports the court's finding.

Frank's ineffective assistance of counsel argument raises a number of significant legal issues. Among them are: (1) Is a "mere" biological father entitled to appointed counsel under section 317 or the due process clauses of the state or federal constitutions? (2) Does the answer to question (1) depend on the nature of the proceeding at which the father seeks representation? (3) Even if the father was not entitled to appointed counsel, if the juvenile court appointed counsel does the father have standing to challenge the adequacy of his counsel's representation? (4) May another attorney "stand-in" for a parent's appointed counsel at a contested hearing without the parent's knowledge and consent?[34]

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[34] We are aware the practice of one parent's attorney "standing in" for another in the same case is common in the Los Angeles County juvenile court and the judicial officers and panel attorneys of that court may believe this custom is a practical necessity given the case load they have to manage. Nevertheless we believe the practice raises serious legal and ethical questions. See for example section 317, subdivision (d) which provides: "The counsel appointed by the court shall represent the parent . . . at the detention hearing and at all subsequent proceedings before the juvenile court. Counsel shall continue to represent the parent . . . unless relieved by the court upon substitution of other counsel or for cause." See also Rule 3-700 of the Rules of Professional Conduct specifying the circumstances under which an attorney may withdraw from representation. And finally, see *In re Marriage of Park* (1980) 27 Cal.3d 337, 343-344 in which the court reversed a default judgment of dissolution because the wife was denied a fair hearing. The wife had been deported and her attorney had been appointed as a court commissioner. A new attorney appeared at the dissolution hearing claiming to represent the wife. The original attorney, however, never filed a substitution of attorneys; the wife never consented to the new attorney's representation (nor indeed even know about it); and the new attorney could not be considered associated with the original attorney. The case before us is even more troubling. At least in *Park* the wife had an independent advocate. Here the father was "represented" by the same attorney representing the mother in a case in which the parents conceivably had conflicting interests.

Although these are significant issues it would unnecessarily prolong this opinion to analyze them here. Even if our resolution of these issues favored Frank's position he would not be entitled to the relief he seeks.

We cannot say from the record before us the failure to present evidence or argument Z.K. was unlikely to be adopted constituted ineffective assistance of counsel. There may have been a very good reason for this failure—no such evidence may have existed. Thus the claim of ineffective assistance of counsel would have to be developed through additional evidence submitted in a writ petition.

But there is no need for a writ petition in this case because it is not reasonably probable any evidence or argument Frank's counsel could have produced would have resulted in a finding Z.K. was unlikely to be adopted.[35] As discussed above,[36] Z.K.'s prospective adoptive mother testified at the 366.26 hearing. She told the court she was aware Z.K. had behavioral problems and a speech impediment but those problems did not deter her from wanting to adopt him. "I will deal with it," she testified. She also stated she "most definitely" wanted to adopt Z.K. and would be "heartbroken" if she could not. "He's accepted in my family already [and] he's not even adopted," she explained.

Because of the overwhelming evidence of Z.K.'s adoptability there is no reasonable probability the court would not have terminated Frank's parental rights if his counsel had appeared at the 366.26 hearing and sought to establish nonadoptability.

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[35] See *Celine R.* (2003) 31 Cal.4th 45, 60. There is no need to assess counsel's performance if it is clear from the record the appellant cannot establish prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 697.)

[36] See page 10, *ante*.

III. AN ERRORLESS TERMINATION OF ONE PARENT'S PARENTAL RIGHTS IS NOT REVERSIBLE MERELY BECAUSE ERROR OCCURRED IN TERMINATING THE OTHER PARENT'S PARENTAL RIGHTS.

Relying on *In re DeJohn B.*[37] and *In re Eileen A.*[38] Frank argues reversal of the judgment terminating Kim's parental rights requires the judgment terminating his parental rights must be reversed as well despite the absence of any prejudicial error as to him.[39] We disagree with the reasoning in those decisions and reject Frank's contention he can piggy-back on the reversal as to Kim.

In *DeJohn B.* the Court of Appeal reversed the judgment terminating the mother's parental rights because she was denied a fair hearing at the six month review where the dependency court terminated reunification services and scheduled a permanency hearing.[40] The father also noticed an appeal from the termination of his parental rights but raised no "independent challenge" to the judgment. Nevertheless he argued his parental rights must be reinstated if the mother prevails on her appeal.[41] The court agreed.

The court cited rule 1463, subdivision (a) of the California Rules of Court which states: "The court may not terminate the rights of only one parent under section 366.26 unless that parent is the only surviving parent, or the rights of the other parent have been terminated . . . or the other parent has relinquished custody of the child to the welfare department."[42] It then explained in the case before it the rights of both parents were

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[37] *In re DeJohn B.* (2000) 84 Cal.App.4th 100, 110.

[38] *In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1263.

[39] See discussion in Part II, *ante*.

[40] *In re DeJohn B.*, *supra,* 84 Cal.App.4th at page 102.

[41] *In re DeJohn B.*, *supra,* 84 Cal.App.4th at page 102.

[42] *In re DeJohn B.*, *supra,* 84 Cal.App.4th at page 110. In *Los Angeles County Dept. of Children & Fam. Services v. Superior Court* (2000) 83 Cal.App.4th 947, 949 we held where the parental rights of both parents are terminated but only one parent appeals, reversal of the judgment as to that parent does not permit the dependency court to set

terminated in a single proceeding as required by rule 1463 but "we are reinstating mother's rights pending further proceedings; thus the stated purpose of 'free[ing] the dependent child for adoption' (Cal. Rules of Court, rule 1463(g)) is not now attainable."[43] Rather than leave the children "in limbo" until a determination is eventually made whether they will be adopted or returned to their mother the court found "it is in the minors' best interests to reinstate father's parental rights" so the children could enjoy "whatever legal benefits or entitlements that may come to them through the paternal side of the biological family."[44]

It was unclear from the court's opinion in *DeJohn B.* whether the court believed in a case where both parents appeal from a judgment terminating their parental rights but there is reversible error as to only one the judgment must be reversed as to the other parent as well or whether reversal in favor of the parent as to whom no error was found is a matter within the appellate court's discretion based on the child's best interests.

A month after the *DeJohn B.* decision the same court held in *In re Eileen A.* reversal as to one parent mandated reversal as to the other.[45] In *Eileen A.* the dependency court terminated the parental rights of the mother and father and both parents appealed. The mother argued her parental rights had been terminated as the result of ineffective assistance of her counsel. The appellate court agreed and reversed the judgment as to the mother.[46] The father filed a letter with the court in which he "declin[ed] to present an opening brief on the merits."[47] Notwithstanding any assertion of error as to the father, the court held: "In light of the reversal of the termination order as to [the mother] we are

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aside the judgment as to the nonappealing parent. Nothing in *DeJohn B.*, *Eileen A.* or our opinion in the case before us affects that holding.

[43] *In re DeJohn B.*, *supra,* 84 Cal.App.4th at page 110. The provisions of subdivision (g) are now found in subdivision (h). (Cal. Rules of Court, rule 1463, as amended January 1, 2005.)

[44] *In re DeJohn B.*, *supra,* 84 Cal.App.4th at page 102.

[45] *In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1263.

[46] *In re Eileen A.*, *supra,* 84 Cal.App.4th at page 1253.

required by rule 1463(g) of the California Rules of Court . . . to reverse the termination of [the father's] rights as well."[48] As authority for its determination it was required to reverse as to the father the court quoted the portion of rule 1463 which stated: "the court shall not terminate the rights of only one parent unless that parent is the only surviving parent."[49]

With due respect to our colleagues to the south we believe *DeJohn B.* and *Eileen A.* were wrongly decided.

Rule 1463 of the California Rules of Court does not mandate reversal of an untainted judgment against one parent-appellant any time there has been prejudicial error in the judgment against the other parent-appellant. Subdivisions (a) and (g) [now (h)] of the rule do not apply to appellate courts as their language makes clear. Both subdivisions state "the court" may not terminate the rights of only one parent. Clearly "the court" being referred to is the dependency court, not the Court of Appeal. Appellate courts do not terminate parental rights; dependency courts do. Appellate courts affirm, reverse or modify judgments terminating parental rights.

Furthermore, appellate courts have no power to reverse a judgment unless there has been prejudicial error as to the appellant. Article 6, section 13 of the California Constitution states: "No judgment shall be set aside . . . unless . . . the court shall be of the opinion that *the error complained of* has resulted in a miscarriage of justice." (Italics added.) As explained in Part II above, in the present case we are of the opinion allowing "stand-in" counsel to represent Frank at the 366.26 hearing, even if error, did not result in a miscarriage of justice. Therefore Frank is not entitled to a reversal of the judgment terminating his parental rights.

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[47] *In re Eileen A.*, *supra,* 84 Cal.App.4th at page 1263; see *In re Sade C.* (1996) 13 Cal.4th 952.

[48] *In re Eileen A.*, *supra,* 84 Cal.App.4th at page 1263.

[49] Similar language in now contained in California Rules of Court, rule 1463, subdivision (h).

DISPOSITION

The orders denying Kim W.'s section 388 petition and terminating her parental rights are reversed. The cause is remanded to the juvenile court with directions to conduct a new hearing on the petition consistent with the views expressed in this opinion and taking into consideration any developments occurring after the entry of the orders appealed from. If appropriate after such hearing the court shall hold a new hearing pursuant to section 366.26.

The order terminating Frank A.'s parental rights is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, Acting P.J.

We concur:

WOODS, J.

ZELON, J.